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No. 04-467

In the Supreme Court of the United States

PEARSON EDUCATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner's campaign leaflet threatened to withhold a promised wage increase if the Union won the election, and thus warranted setting aside the election result and directing a second election.

2. Whether the National Labor Relations Board properly determined that asserted changed circumstances did not render the certified bargaining unit inappropriate.

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OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-11a) is reported at 373 F.3d 127. The decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 19a-23a), including the decision of the administrative law judge (Pet. App. 23a-42a), is reported at 336 N.L.R.B. 979. The Board's subsequent denial (Pet. App. 12a-18a) of petitioner's motion for reconsideration or for reopening of the record is unreported.

The earlier decision of the court of appeals remanding the case to the Board (Pet. App. 43a-49a) is reported at 194 F.3d 165. The initial decision and order of the Board (Pet. App. 50a-59a) is reported at 327 N.L.R.B. No. 17. The decision of the regional director (Pet. App. 60a-67a) in the representation proceeding is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2004. The petition for a writ of certiorari was filed on October 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner distributes and sells reference materials and educational materials. Pet. App. 2a, 44a. In 1997, petitioner—then Macmillan Publishing, Inc.— operated two distribution warehouses in Indianapolis. *Ibid.* In June 1997, the Union of Needletrades, Industrial and Textile Employees of the AFL-CIO (Union) petitioned the Board to represent "all full-time and all regular part-time warehouse and distribution center employees" at both facilities. *Id.* at 2a-3a, 44a. Petitioner argued that holding an election at that time would not effectuate the purposes of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, because in January 1998 petitioner was planning to consolidate and transfer its operations to a new facility 17 miles away. Pet. App. 3a, 44a. The Board's regional director found that the intended relocation did not render an immediate election inappropriate and directed an election. *Ibid.* The Board denied petitioner's request for review of that decision. *Ibid.*

The election was held on August 13, 1997. Pet. App. 3a. The initial results revealed a sufficient number of challenged ballots to affect the results of the election, and the regional director ordered a hearing to resolve the ballot challenges. *Ibid.* With the election outcome then unknown, petitioner and the Union both filed objections to the election. *Ibid.* After resolving the ballot challenges, the regional director issued a revised tally indicating that the Union lost the election, 78-75. *Id.* at

3a, 44a. Petitioner withdrew its objections to the election, leaving the Union's objections to be resolved by the regional director. *Id.* at 3a, 60a-66a.

One of the Union's objections alleged that a leaflet distributed by petitioner "threaten[ed] employees with the loss of the promised wage increase . . . if they selected the union as their bargaining representative." Pet. App. 3a, 62a. About a week prior to circulating the leaflet, petitioner announced that, after the move to the new facility, employees would be getting hourly increases of $1.10, and later of $1.25, a total wage increase of approximately 10%. *Id.* at 3a, 8a, 28a. Several days before the election, petitioner distributed a leaflet that stated:

WHAT DO YOU HAVE

TO LOSE?

HOW ABOUT:

$2,522.00 next year!

$1.10 per hour	$1.25 per hour
x 40 hours per week	x 40 hours per week
$44.00 per week	$50.00 per week
x 13 weeks =	x 39 weeks =
$572.00 in Jan-Mar	$1,950.00 Apr-Dec

For a total of $2,522.00 next year

Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move.

> With a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package would be.
>
> **WHY TAKE THE RISK?**
>
> **VOTE NO!**

Id. at 3a, 31a-32a, 67a.

b. Without passing on the Union's other objections, the regional director sustained the Union's claim that the leaflet constituted objectionable conduct. Pet. App. 44a, 62a-63a. The regional director found that the leaflet violated the principle that "an employer should decide the question of granting or withholding benefits as it would if a union were not in the picture." *Id.* at 4a, 63a. The Board denied petitioner's request for Board review of the regional director's decision. *Id.* at 4a.

2. a. A second election was held in June 1998, after petitioner had completed its move to the new facility. The Union won 58-52. Pet. App. 4a, 32a. Petitioner filed objections to the election, which did not allege that any objectionable conduct had affected the second election, but alleged only that the first election should not have been held because of petitioner's impending move, or, alternatively, should not have been set aside. *Id.* at 4a. The regional director denied the objections and issued a certification of representative. *Ibid.* The Board denied petitioner's request for review. *Ibid.*

b. Petitioner refused to comply with the Union's bargaining demand and the Union's request for information. Pet. App. 4a, 51a. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1). Pet. App. 4a, 50a. In October 1998, the Board upheld

the allegations of the complaint and ordered petitioner to bargain on request with the Union. *Id.* at 4a, 50a-59a.

3. Petitioner filed a petition for review of the Board's order in the court of appeals. Pet. App. 4a, 43a-49a.

The court first "quickly dispatch[ed] the [petitioner's] argument that the first election was premature because of the impending transfer to" the new facility. Pet. App. 45a. The court noted that the union's certification was based on the second election, not the first one, and the second election took place *after* the move to the new facility. *Id.* at 45a-46a.

Turning to the Board's decision to set aside the first election, the court of appeals rejected the regional director's conclusion that the leaflet itself violated the principle that an employer during an election campaign "should act as if a union were not in the picture." Pet. App. 48a (internal quotation marks omitted). The court stated that "[t]here is no such principle governing employer communications during election campaigns." *Ibid.* The court noted that in court the Board had sought to defend its decision to order a second election on other grounds, including the fact that the leaflet made an impermissible threat, but the court concluded that it "cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings." *Id.* at 49a. The court remanded the case to the Board for further proceedings. *Ibid.*

4. a. On remand, after a further hearing, an administrative law judge found that petitioner's leaflet was "coercive in that it explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union." Pet. App. 33a. The judge found that the leaflet "sends the clear message" that, in the

absence of the Union, petitioner "is willing to grant the raise, but if the Union wins the election, [petitioner] will pay only what the Union can force it to pay." *Id.* at 34a. The judge observed that, because the raise was promised before the election, petitioner had a duty to implement it at the scheduled time if the Union won. The message of the leaflet, however, was not that the union could bargain away the increase, but that "the Union would have to bargain to get the employees the raise, and this is simply not true." *Id.* at 37a. Accordingly, the judge set aside the first election, reaffirmed the Union's certification based on its victory in the second election, and recommended that the Board reaffirm its order requiring petitioner to bargain with the Union. *Id.* at 5a, 23a-42a.[1]

Petitioner filed exceptions to the judge's decision with the Board. Pet. App. 5a, 19a. On October 31, 2001, the Board, accepting the judge's recommendation, issued a decision reaffirming its prior bargaining order. *Id.* at 5a, 19a-22a.

b. Petitioner filed a motion for reconsideration or for reopening of the record. The motion contended that, in the time since the regional director's designation of the bargaining unit and the two elections, numerous changes at its new facility rendered the bargaining unit inappropriate. Pet. App. 6a, 12a. The Board denied petitioner's motion. *Id.* at 6a, 12a-18a. The Board noted

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[1] At the hearing, the Union withdrew four of its eight objections. Pet. App. 5a, 25a. In addition to the objection to the leaflet, the administrative law judge sustained two other objections, which are not at issue in this petition. *Id.* at 37a-41a. Also, at the outset of the hearing, petitioner moved to change its name from Macmillan Publishing, Inc. to Pearson Education, Inc. because, in November 1998, Viacom had sold Macmillan to Pearson. *Id.* at 25a.

that many of the changes cited by petitioner had occurred prior to the second election, and had already been considered, and rejected, by the court of appeals as a basis for dismissing the Union's election petition. *Id.* at 9a-10a, 13a-14a, 16a. The Board found that other changes, alleged to have occurred since the second election, provided no basis under well-established law for finding the certified unit no longer appropriate. *Id.* at 14a-17a. The Board explained that the alleged changes "are no different in nature or extent than one would normally expect to occur with the passage of time," and if treated as sufficient to warrant finding a unit inappropriate, "certifications of representative would be illusory." *Id.* at 16a.

5. Petitioner filed a petition for review of the Board's October 31, 2001, order in the court of appeals. The court affirmed the Board's decision. Pet. App. 1a-11a. The court agreed with the Board that the leaflet "threatened to withhold a promised wage increase if the union won the election." *Id.* at 7a. The court explained that, under settled law, an employer's statement that a previously announced wage increase will probably be lost if a union wins constitutes employer coercion. *Id.* at 7a-9a. The court agreed with the Board that the leaflet "explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union." *Id.* at 8a. The court referred to the statements in the leaflet that "[w]ithout a Union, [petitioner] will be free to proceed ahead with the announced wage increases," but "[w]ith a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package will be," followed by the question "WHY TAKE THE RISK?." *Ibid.* The court agreed with the Board that the leaflet, including the quoted statements, was coercive because it sent

"the clear message that, in the absence of the Union, [petitioner] is willing to grant the raise, but if the Union wins the election, [petitioner] will pay only what the Union can force it to pay." *Ibid.* (quoting *id.* at 34a). The Court recognized that the Union could legally bargain away the raise, but agreed with the Board's conclusion that "[t]he message of the leaflet is that the Union would have to bargain to get the employees the raise, and this is simply not true." *Id.* at 9a (quoting *id.* at 37a).[2]

The court rejected petitioner's contention that changed circumstances made the bargaining unit or certification inappropriate. The court noted that, in the first appeal, it had considered and rejected most of petitioner's alleged changed circumstances—including the consolidation of the two separate facilities into one new facility, and changes to work procedure and technologies used by employees—as a basis for dismissing the Union's election petition. Pet. App. 9a-10a. The court further concluded that additional asserted post-election changes in ownership and employee turnover were "each insufficient grounds to render a certification no longer appropriate." *Id.* at 10a. The recent change of ownership, the court noted, made no difference because there was no claim that less than half of the employees after the change had been employed by petitioner prior to the change. *Ibid.* Finally, the court rejected as contrary to settled law petitioner's reliance on post-election employee turnover. *Ibid.* The court also noted that it was "unclear whether the relevant bargaining unit has changed in size at all," and, in any event, the

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[2] Having agreed with the Board that the leaflet was objectionable, the court declined to reach the additional alleged objectionable conduct by petitioner. Pet. App. 9a.

court held that "even a doubling in size of the bargaining unit is not the kind of change that alters the ongoing validity of a Board certification." *Id.* at 10a-11a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. Contrary to petitioner's claim, this case raises no question about the interpretation of Section 8(c) of NLRA, 29 U.S.C. 158(c), and the First Amendment. Section 8(c) protects only employer communications that "do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), quoting 29 U.S.C. 158(c). As the court of appeals held, the Board correctly found that petitioner's leaflet threatened to withhold a promised wage increase if the Union won the election, by stating that "the promised wage increase will be put in jeopardy if employees choose the Union." Pet. App. 8a. The law is clear that a wage increase, such as that promised by petitioner, "must be awarded even if a union wins an election." *Id.* at 9a, citing *Advo System, Inc.*, 297 N.L.R.B. 926, 940 (1990), and *Arrow Elastic Corp.*, 230 N.L.R.B. 110, 113 (1977), enforced, 573 F.2d 702 (1st Cir. 1978). Petitioner's leaflet, however, sent "the clear message" that, if the Union won, petitioner "will pay only what the Union can force it to pay." *Id.* at 8a. The court concluded that the message that a previously announced wage increase would probably be lost if a union wins "constitutes employer coercion." *Id.* at 7a-8a, citing *Flamingo Hilton-Laughlin*, 324 N.L.R.B. 72, 111 (1997) (employer threat during election campaign to withdraw a pay raise previously

announced in campaign is "a heavy suppression of employees' rights to engage in protected activities"), enforced in relevant part, 148 F.3d 1166, 1175 (D.C. Cir. 1998).

Petitioner's disagreement with the interpretation of the leaflet by both the court and the Board is a fact-bound issue that does not warrant further review by this Court. Petitioner argues that the leaflet constituted merely a permissible communication by an employer of the potential risks of unionization, and petitioner faults the court and the Board for reading "into the leaflet something it did not state." Pet. 14. Even if the leaflet were open to differing interpretations, further review by this Court would not be warranted to determine which one is correct. In any event, the Board and the court of appeals correctly concluded that the leaflet was a threat. As the court explained, the leaflet—which told employees that the announced increase, amounting to "$2,522.00 next year," was "what . . . you have to lose if the Union wins"—was an explicit statement "that the promised wage increase would be put in jeopardy" if the employees selected the Union. Pet. App. 8a. This Court has long recognized that, in assessing employer statements, the Board and reviewing court must take into account "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel Packing Co.*, 395 U.S. at 617. Accord *Southwire Co.* v. *NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987). The court of appeals correctly affirmed the Board's determination that, from the viewpoint of the employees, the leaflet did not convey merely the message that the Union could bargain the

raise away as part of the collective-bargaining process, but instead conveyed the false and coercive message that, if the Union won, employees would not get the promised raise to which they were entitled unless the Union could induce the employer to restore it. Pet. App. 9a, 37a.[3]

b. Equally without merit is petitioner's argument (Pet. 16-18) that the Board improperly failed to evaluate the leaflet in the context of surrounding circumstances. Not only did the Board consider surrounding circumstances, but it reasonably found (Pet. App. 22a, 39a), contrary to petitioner's assertion, that surrounding circumstances corroborated the coercive nature of the leaflet. Thus, the Board found that supervisors told employees, at an employee meeting and separately,

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[3] The coercive nature of the message in the leaflet contrasts with the permissible message that petitioner relies on (Pet. 14-15) in *Lee Lumber & Building Material Corp.*, 306 N.L.R.B. 408, 409-410 (1992), reviewed as to other matters, 117 F.3d 1454 (D.C. Cir. 1997), where the employer told employees that "the Union might raise the pension/profit sharing issue, as it had in previous negotiations, and that the subject would be negotiable." Contrary to petitioner's claim (Pet. 15), *Technology Service Solutions*, 332 N.L.R.B. 1096, 1108-1109 (2000), reconsidered as to other matters, 334 N.L.R.B. 116 (2001), does not support petitioner's argument. The finding on which petitioner relies in *Technology Service Solutions* was not reviewed by the Board (332 N.L.R.B. at 1096 n.5), and, accordingly, cannot be considered precedent for any other case. See *Stanford Hospital & Clinics* v. *NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1042 (2004); *Colgate-Palmolive Co.*, 323 N.L.R.B. 515, 515 n.1 (1997). In any event, in *Technologoy Service Solutions*, unlike here, the employer assured the employees that a newly granted wage increase would be left in place no matter how the election turned out, while merely advising of the possibility that the collective-bargaining process might *later* result in an agreement to lower wages. 332 N.L.R.B. at 1108-1109.

that they would not get the announced raise if the Union were voted in. *Id.* at 22a, 39a, 40a. Also at an employee meeting, petitioner's head of human resources, when asked if petitioner's president had promised that employees would still get the raise if the Union were voted in, stated: "I don't remember, but I don't believe you will, because when we go to negotiate, if the union gets in, we start at zero." *Id.* at 39a. That official repeated the same admonition at a later employee meeting when he said that, if the Union got in, employees would "lose benefits" and everything "would go back to zero." *Id.* at 22a, 39a. See *TRW-United Greenfield Div.* v. *NLRB*, 637 F.2d 410, 420-421 (5th Cir. 1981) (employer's remarks that it will "bargain from scratch" or from "ground zero" constitute impermissible threats where they are likely to be understood as implying that the employer might either "unilaterally discontinue existing benefits prior to negotiations, or * * * adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees for choosing collective representation"); accord *Belcher Towing Co.* v. *NLRB*, 726 F.2d 705, 711 (11th Cir. 1984). The Board reasonably found that those statements, far from reassuring employees that petitioner would grant the promised wage increase even if the Union won, instead reinforced the threat in the leaflet. Pet. App. 22a, 39a, 41a. In any event, petitioner's disagreement with that particular factual finding does not warrant review by this Court.

2. Petitioner's claim (Pet. 22) that alleged changed circumstances affected the propriety of the Board's certification, or its bargaining order based on that certification, presents no issue warranting review. Indeed, the court of appeals' decision is consistent with long-established precedent rejecting such changes as a basis

for invalidating a union's certification as bargaining representative or a bargaining order based on the certification, and petitioner has shown no reason for this Court to reconsider that precedent.[4]

For example, a change in ownership itself has no impact on a union's certification or the employer's bargaining obligation. See *NLRB* v. *Burns Int'l Sec. Servs.*, 406 U.S. 272, 279 (1972). Similarly, petitioner's reliance on asserted employee turnover is inconsistent with this Court's decision in *Brooks* v. *NLRB*, 348 U.S. 96, 98-99, 103-104 (1954). In *Brooks*, this Court held that after a valid election and Board certification, a union, absent strictly defined "unusual circumstances," is entitled to an irrebuttable presumption of majority status, ordinarily for one year—"the certification year"—during which it may pursue negotiations for a collective-bargaining agreement unhampered by challenges to its majority status. *Id.* at 98-99.[5] Consistent with that policy, it has long been recognized that employee turnover does not justify a refusal to recognize

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[4] Moreover, as the court of appeals held in its first decision, several of the changes petitioner points to (Pet. 9-11)—its consolidation of its two older facilities in the new facility and changes to work procedure and to technologies used by bargaining-unit employees—are simply irrelevant because the Union's certification was based on the second election, which was conducted after the move to the new facility had already taken place. Pet. App. 9a-10a, 45a-46a.

[5] Where, as here, an employer initially refuses to bargain in order to challenge the union's certification, the Board has long held that the certification year typically runs from the date the employer actually "begins to bargain in good faith" with the union, irrespective of the date of actual certification. See *Van Dorn Plastic Machinery Co.*, 300 N.L.R.B. 278, 279 (1990), enforced, 939 F.2d 402, 404 (6th Cir. 1991); *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785, 786 (1962).

and bargain with a certified union.[6] See, *e.g.*, *NLRB* v. *Aquabrom, Div. of Great Lakes Chem. Corp.*, 855 F.2d 1174, 1184 (6th Cir. 1988) (because union was never given chance to bargain, *Brooks* precludes employer from relying on inevitable turnover as basis for refusal to bargain); *NLRB* v. *Wackenhut Corp.*, 471 F.2d 761 (6th Cir. 1972) (per curiam) (contention that substantial turnover relieves employer of duty to bargain is directly contrary to *Brooks*); *V & S Schuler Engineering, Inc.*, 332 N.L.R.B. 1243, 1243 (2000) (turnover not the kind of "unusual circumstance" within the meaning of *Brooks* that would permit rebuttal of the Union's majority status or warrant reexamination of its certification), enforced, 309 F.3d 362 (6th Cir. 2002). See generally *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 786 (1996) (certification year removes "any temptation on the part of the employer to avoid good-faith bargaining").[7]

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[6] Petitioner's related argument, based on the claim that the facility's entire workforce has doubled since the second election, is factually and legally infirm. As the court correctly observed (Pet. App. 10a), petitioner failed to allege whether, and to what extent, the *bargaining unit* has changed in size, as distinct from its entire work force. In any event, as the court properly held, even an incremental doubling in the size of a bargaining unit is not the kind of change that alters the ongoing validity of a Board certification. *Id.* at 10a-11a. See *NLRB* v. *Action Automotive, Inc.*, 853 F.2d 433, 434 (6th Cir. 1988), cert. denied, 488 U.S. 1041 (1989).

[7] The cases petitioner cites (Pet. 19-20) for the proposition that the Board has relied on changed circumstances to find certified bargaining units inappropriate are inapposite. For example, *Ramada Inns, Inc. d/b/a Ramada Beverly Hills*, 278 N.L.R.B. 691 (1986), did not, as here, involve whether changed circumstances affected a union's certification during the certification year or the propriety of an order requiring the employer to recognize and bargain with the union. Rather, the Board in that case was faced

Petitioner's reliance (Pet. 21) on decisions of courts of appeals considering changed circumstances, such as employee turnover, in reviewing the propriety of bargaining orders issued pursuant to *NLRB* v. *Gissel Packing Co.*, *supra*, is misplaced. In *Gissel Packing*, this Court held that, where a union enjoyed majority status prior to the election, the Board is authorized to issue a remedial bargaining order if it finds that use of traditional remedies would likely not erase the effects of past unfair labor practices and ensure a fair election or rerun election. 395 U.S. at 614-615. While some courts have examined turnover and other changed circumstances in reviewing *Gissel* bargaining orders, no court has adopted petitioner's suggestion that turnover occurring after a Board certification of election results is an independent basis for overturning a Board order requiring bargaining. See *Scepter, Inc.* v. *NLRB*, 280

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with a new representation petition and relied on changed circumstances in reconsidering a unit determination it had made three years earlier. In the other cases cited, the bargaining obligation ended because, unlike here, the bargaining unit had been radically changed by a dramatic event. See *Kelly Business Furniture, Inc.*, 288 N.L.R.B. 474, 475 (1988) (11 employees from certified unit were moved and merged into new workforce with 35 other employees); *Border Steel Rolling Mills, Inc.*, 204 N.L.R.B. 814, 814-815 (1973) (bargaining unit did not survive transfer of equipment to new employer and inclusion of 12 employees from that certified unit into a 400 "all employee" unit at new workplace represented by a different union); *Renaissance Ctr. P'ship*, 239 N.L.R.B. 1247, 1247 (1979) (certified unit of 59 employees merged with unrepresented group of 67 employees); *St. Bernadette's Nursing Home*, 234 N.L.R.B. 835, 836-837 (1978) (no bargaining obligation where facility that employed between 55-70 employees in the certified unit closed and employer subsequently opened new 207-employee facility including 15 employees from the prior facility's certified unit).

F.3d 1053, 1057 (D.C. Cir. 2002), citing *NLRB* v. *Creative Food Design Ltd.*, 852 F.2d 1295, 1299-1303 (D.C. Cir. 1988) (distinguishing *Gissel* bargaining orders and orders based on a union's certification); *Aquabrom Div. of Great Lakes Chemical Corp.*, 855 F.2d at 1185-1186 (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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